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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>MICHAEL ALLEN HAWKINS,<br>Defendant and Appellant. | E034516<br>(Super.Ct.No. RIC303164)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Carl E. Davis, Judge. (Retired judge of the San Bernardino Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Quisteen S. Shum, Deputy Attorney General, for Plaintiff and Respondent.

## 1. Introduction

Defendant Michael Allen Hawkins appeals a jury finding that he is a sexually violent predator (SVP) under Welfare and Institutions Code section 6600 et seq. (the Sexually Violent Predators Act (SVPA)).[1] He claims the court erred in admitting into evidence probation report and allowing an officer to testify concerning hearsay statements contained in police reports describing his underlying crimes. Additionally, he asserts the prosecutor committed misconduct by arguing facts not in evidence, vouching for a witness, and improperly appealing to the jurors' passions and prejudices. Defendant also complains the prosecutor impermissibly informed the jury of the consequences of an SVP finding. Defendant further asserts various constitutional challenges to the SVPA, most of which defendant acknowledges the federal and/or state supreme courts have rejected.

We conclude there is no reversible error and, as to defendant's constitutional challenges, this court rejects them based primarily on the doctrine of stare decisis. The judgment is affirmed.

## 2. Factual and Procedural Background

According to a 1998 probation report, Riverside sheriff's deputies interviewed four boys, Jeffrey (age 10), Shawn (age 12), Jeremy (age 14), and Courtney (age 10), who reported that defendant befriended them and then molested them.

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[1] Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

During an investigative interview, defendant admitted to sheriff's detectives that he orally copulated Jeffrey about 10 to 20 times. On one occasion, when defendant attempted to orally copulate Jeffrey, Jeffrey ran away. Defendant chased him, brought him back to defendant's house, and orally copulated him. Defendant also masterbated Jeffrey in defendant's truck, while taking Jeffrey and Courtney to the Ascot Raceway.

Defendant also admitted during his interview that he orally copulated Shawn: "Could be a thousand, could be a hundred million [times], I don't really know." According to Shawn, defendant orally copulated him 10 times at defendant's house, beginning in 1987, and continuing through May of 1988.

According to Jeremy, defendant orally copulated him twice, once in October 1987, while Shawn watched, and once two weeks later at defendant's house. During the second incident, defendant begged Jeremy to let him orally copulate him, promising it would be the last time and he would not orally copulate any other boy. Jeremy agreed, assuming defendant would keep his promise. During his interview, defendant admitted orally copulating Jeremy in defendant's room in 1987.

According to Courtney, defendant had made sexual advances toward him and had attempted unsuccessfully to orally copulate him. Courtney reported that defendant had orally copulated Jeffrey during their trip to the Ascot Raceway.

On April 22, 1988, defendant pled guilty to eight counts of committing lewd and lascivious acts, between 1987 and 1988, upon three boys under the age of 14 years. (Pen. Code, § 288, subd. (a).) Defendant also pled guilty to two counts of orally copulating a

boy under 16 years of age. (Pen. Code, § 288a, subd. (b)(2).)

The court sentenced defendant to 18 years in state prison and placed him in the custody of the Department of Mental Health for sex offender treatment.

In 2001, the Riverside County District Attorney filed an extended commitment petition, alleging defendant was an SVP based on his lewd and lascivious acts involving Jeffrey, Shawn, and Jeremy. (§ 6600.)

At the SVP commitment trial, Dr. Osran, a staff psychiatrist at Atascadero State Hospital (ASH), testified that he evaluated defendant in 2001 to determine whether defendant met the criteria of an SVP. Defendant declined to be interviewed. Defendant, however, agreed to be interviewed in June 2002. Dr. Osran testified defendant suffered from the mental disorders of pedophilia, nonexclusive type, and polysubstance abuse. Dr. Osran noted defendant molested the boys over a two-year period, suggesting the molestation reflected a chronic pattern of behavior in which defendant befriended the boys for the purpose of molesting them.

Dr. Osran concluded defendant used force to molest Jeffrey, when Jeffrey attempted to run away. Also, the incident in which defendant begged Jeremy to allow him to orally copulate him demonstrated manipulative conduct commonly exhibited by pedophiles. Dr. Osran concluded defendant likely would reoffend and engage in future sexually predatory behavior if released from ASH. Defendant was unable to control his behavior. At the time he committed the sexual misconduct, he knew his behavior was unlawful but did it anyway.

Dr. Paladino, another ASH staff psychiatrist, also evaluated defendant. She was defendant's treating psychiatrist since May 2000. Dr. Paladino evaluated defendant in 2001 and prepared an updated evaluation in 2002. Defendant declined to be interviewed in 2001 but agreed to an interview in 2002. Dr. Paladino testified that defendant met the criteria of an SVP. He suffered from the mental disorders of pedophilia, nonexclusive type, and polysubstance dependence. He also had a personality disorder and likely would reoffend if released from ASH.

According to Dr. Paladino, individuals who target boys tend to be the most repetitive of all known sex offenders. Dr. Paladino testified that, although defendant reportedly had a homosexual relationship with a male patient at ASH, defendant likely would reoffend if released, particularly since he had demonstrated a lack of control when he committed the sexual offenses and had not actively participated in sex offender treatment.

The third expert testifying at trial, Psychologist Donaldson, was court appointed to evaluate defendant at defendant's request. Dr. Donaldson testified there was insufficient evidence to conclude defendant was a pedophile. Dr. Donaldson did not believe defendant preferred having sex with children. Rather, the molestations were opportunistic and were more incestual in nature. Defendant had had lengthy relationships with the victims, he and the boys were often at each other's homes, and they frequently did things together. According to Dr. Donaldson, incest offenders have a lower risk of reoffending. Dr. Donaldson concluded defendant was a closet homosexual

who turned to children because he was acting out. Defendant concluded two of the victims consented to the molestation. Dr. Donaldson also believed defendant did not have difficulty controlling his behavior and did not have an antisocial personality disorder but, rather, was immature.

Based on the evidence adduced at trial, in 2003 a jury found defendant to be an SVP and the court ordered defendant committed to the Department of Mental Health for two years. Defendant appeals the commitment order.

3. Admission of the Probation Report

Defendant argues the court prejudicially erred in admitting the probation report relating to his underlying criminal offenses.

Defendant concedes that under *People v. Otto* (2001) 26 Cal.4th 200 (*Otto*) the probation report is admissible. In *Otto*, the California Supreme Court explicitly rejected the argument that multiple hearsay statements contained in probation reports were inadmissible unless such statements fell within an exception to the hearsay rule. The *Otto* court held that under section 6600, subdivision(a)(3), such hearsay statements are admissible when used to establish that a person is a SVP.

Section 6600, subdivision(a)(3) states in relevant part: "The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to,

preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health."

Defendant also concedes the court in *Otto* rejected the argument that admission of such multiple level hearsay is a violation of defendant's due process rights. The *Otto* court reasoned that statements found in probation reports are almost always reliable in an SVP proceeding since the defendant must have been convicted of sexually violent offenses against at least two victims. As a consequence, the criminal conduct has already been admitted in a plea or found true by the trier of fact following a trial. (*Otto, supra,* 26 Cal.4th at pp. 208, 211-213.)

Despite conceding these two arguments were rejected in *Otto*, defendant asserts the California Supreme Court wrongly decided *Otto*. He thus raises the arguments for the purpose of preserving his objections for federal court review.

Defendant further argues that *Otto* is inapplicable to the instant case because the crimes in the instant case do not automatically qualify as sexually violent offenses under section 6600. (See concurring opinion of George, C.J., *Otto, supra,* 26 Cal.4th at pp. 215-219.) A finding that a defendant, who has been convicted of a Penal Code section 288, subdivision (a) offense, is a SVP requires evidence of substantial sexual conduct, force or duress. Evidence of force or duress is also required as to a Penal Code section 288a, subdivision (b)(2) offense. Defendant argues that these additional factors were not necessarily proven or admitted by virtue of a guilty plea or conviction and, thus, the hearsay statements in the report constituted unreliable, inadmissible evidence. The court

in *Otto* rejected this argument as well. (*Otto, supra,* 26 Cal.4th at p. 212.)

The defendant in *Otto*, as in the instant case, was convicted of committing a Penal Code section 288, subdivision (a) offense. We thus conclude that here, under *Otto*, there was no evidentiary error in admitting the probation report. (*Otto, supra,* 26 Cal.4th at pp. 206-207, 211.)

Defendant further argues the trial court abused its discretion in not redacting from the probation report statements that defendant's incarceration should be extended. At trial, defense counsel requested redacted (1) defendant's probation officer's statement in the probation report that defendant should be incarcerated in state prison for the maximum period of time; (2) a statement in the victim's section of the probation report by the mother of one of the victims that defendant should go to prison, although she believed it would not do him any good; and (3) a statement by another victim's mother that defendant should go to prison to keep him away from children. Defendant also complains that the court should have redacted portions of the probation report listing the dismissed charges and defendant's sentence, as well as Dr. Moral's statement defendant suffered from a "pedophilic disorder, homosexual type." The trial court overruled defendant's objection to admission of the probation report and rejected the redaction requests.

Even assuming these statements should have been redacted, failure to do so was harmless error. As to Dr. Moral's statement in the probation report, Drs. Osran and Paladino testified they were of the same opinion that defendant suffered from pedophilia

and was homosexual. Thus, the statement in the probation report that Dr. Moral concluded defendant suffered from a "pedophilic disorder, homosexual type," was harmless, cumulative opinion evidence. The other enumerated items also do not individually or cumulatively rise to the level of prejudicial error. It is not reasonably probable defendant would have obtained a more favorable outcome had these statements been redacted from the probation report. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

4. Admissibility of Sergeant Baeckel's Testimony

Defendant contends the trial court committed prejudicial error in allowing Sergeant Baeckel's irrelevant and inadmissible hearsay testimony relating to investigative procedures and to the witness statements contained in the police reports. Defendant claims Baeckel's testimony is not admissible under section 6600 since it is not documentary evidence and because the underlying police reports were inadmissible because they do not qualify as reliable documentary evidence under section 6600.

Baeckel's testimony does not constitute prejudicial error. As defendant acknowledges in his appellant's opening brief, "To the extent that Officer Backell [*sic*] testified as to statements made by appellant in Backell's [*sic*] personal presence, that testimony was admissible as a party admission." Baeckel testified that he interviewed defendant and defendant told him that he had been sexually active with the victims. He said he had molested one boy at least 10 times and another boy 10 to 20 times but it could have been a thousand or million times. With each boy it was at least twice a month. Defendant said he knew it was wrong and did not know why he continued. This

testimony was admissible under the party admission hearsay exception. (Evid. Code, § 1220.)

With regard to the remainder of Baeckel's testimony that was not admissible under the party admission hearsay exception, admission of that testimony was harmless error. To be committed as an SVP, "the People were required to prove that (1) defendant had been convicted of two separate sexually violent offenses; (2) he had received a determinate term; (3) he had a diagnosable mental disorder; and (4) his disorder made it likely he would engage in sexually violent conduct if released." (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.)

In enacting the SVPA, the Legislature stated: "The Legislature finds and declares that a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. . . . It is the intent of the Legislature that once identified, these individuals, if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society." (Stats. 1995, ch. 762, § 1, p. 5913 (S.B. 1143); Stats. 1995, ch. 763, § 1, pp. 5921-5922 (A.B. 888).)

Here, there was ample evidence, including the probation report and defendant's admissions to Baeckel, establishing defendant qualified as an SVP. The evidence shows defendant committed at least two qualifying offenses. Defendant concedes in his appellant's opening brief that "even if all the other hearsay evidence was excluded, the

probation report provided substantial evidence demonstrating that appellant committed two, but not three, qualifying priors." In addition, all but one of the experts found defendant to be an SVP and a person who was likely to commit future predatory acts.

Baeckel's testimony pertaining to defendant's admissions was admissible and admission of the remainder of his testimony was harmless beyond a reasonable doubt.

5. Prosecutorial Misconduct

Defendant contends the prosecutor committed numerous instances of prosecutorial misconduct, including arguing facts not in evidence, vouching for witness, and improperly appealing to the jurors' passions and prejudices. "Prosecutorial misconduct involves the use of deceptive or reprehensible methods in an effort to persuade the jury [citation] or actions so egregious as to infect the trial with unfairness [citation]." (*People v. Carter* (2003) 30 Cal.4th 1166, 1207.) In order to prove misconduct, defendant must establish that the prosecution's behavior at trial went below the standard of behavior for prosecutors. Prosecutors are generally given wide latitude in arguing a case: "'"'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citations.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Argument is permissible, so long as the argument "'"'". . . amounts to fair comment on the evidence, . . ."'"'" (*People v. Hill, supra,* 17 Cal.4th at p. 819.) Prosecutors also have "'"'". . . broad discretion to state [their] views as to what the evidence shows . . . ."'"'" (*People v. Welch* (1999) 20 Cal.4th 701, 752.) However, prosecutors are held to a high standard at trial "because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.]" (*People v. Hill, supra,* 17 Cal.4th at p. 820.)

If the prosecutors overstep the latitude given them within a case, they are guilty of misconduct. For misconduct to cause a case to be overturned on review, it must have been prejudicial. In order for misconduct by the prosecutor to be prejudicial, the federal standard is it must "'"'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if the action does not render the trial fundamentally unfair. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 969.)

**A. Facts Not In Evidence**

Defendant first complains of the following instances in which the prosecutor argued facts not in evidence: (1) the prosecutor argued defendant's own doctor, Dr. Moral, concluded defendant was a pedophile; (2) the victims "weren't sexualized before they met"; (3) Courtney's mother figured out what was going on and reported it to the police; (4) children referred to defendant as the "Mead Valley taxi cab," but the parents

did not know of this nickname, and this implied defendant was concealing his nickname for nefarious purposes; and (5) "this is not a case about life imprisonment or the respondent somehow being found guilty."

Defendant asserts that these instances of prosecutorial misconduct, in which the prosecutor referred to matters outside the record, were prejudicial because they presented defendant in a more unfavorable light.

As to the prosecutor's statement Dr. Moral diagnosed defendant as a pedophile, the court appropriately responded to defense counsel's objection, "refers to facts not in evidence," by admonishing the jury to "Rely on your own recollection . . . whether or not that evidence exists." Defense counsel did not request any further admonishment. Later, defense counsel again objected to the prosecutor's reference to Dr. Moral on the ground the prosecutor was referring to facts not in evidence. Dr. Moral did not testify at trial. However, the testifying experts made reference to Dr. Moral's opinions and two of the three experts relied on his opinion. Dr. Moral's conclusion that defendant was a pedophile was also stated in the probation report, although the report was admitted solely for the purpose of establishing defendant's prior sexual offenses.

The prosecutor's brief reference to Dr. Moral's diagnosis does not constitute prejudicial misconduct warranting reversal. The misconduct was not so egregious as to warrant reversal, particularly when there was overwhelming evidence defendant was a pedophile and Dr. Osran testified that Dr. Moral had concluded this.

As to the prosecutor's statement that neighborhood children referred to defendant as the "Mead Valley taxi cab," there was evidence of this as well. Defendant claims the prosecutor's statements prejudicially implied defendant gave children rides for the purpose of molesting them. But the prosecutor's statements regarding defendant's nickname were supported by the evidence.

The other above-enumerated statements defendant claims constitute prosecutorial misconduct also do not warrant reversal. A prosecutor generally is given wide latitude in arguing his or her case and may make reasonable inferences or deductions from the evidence. (*People v. Hill, supra,* 17 Cal.4th at p. 819.) These statements, within the context in which they were made, do not constitute misconduct. In addition, the statements do not rise to the level, independently or collectively, of "deceptive or reprehensible methods in an effort to persuade the jury [citation] or actions so egregious as to infect the trial with unfairness [citation]." (*People v. Carter, supra,* 30 Cal.4th at p. 1207.) The statements, even if falling outside the wide latitude of acceptable argument, were relatively inconsequential such that they would not likely have infected the trial with unfairness. (*Ibid.*)

**B. Vouching for Witnesses**

Defendant complains that during closing argument the prosecutor inappropriately vouched for Courtney's credibility. The prosecutor stated during closing argument: "By the way, this is a small point, but remember the investigating officer's description of how he got the case. . . . Courtney is the first one that gives the accurate account of what

happened and sets that investigation in progress." Defense counsel objected on the grounds of "vouching." The court responded that the same ruling as previously stated applied: the jurors must rely on their own recollection of the evidence and defense counsel would have a chance to respond to any misstatements.

The prosecution is prohibited from vouching for witnesses, "or otherwise bolstering the veracity of their testimony . . . ." (*People v. Frye, supra,* 18 Cal.4th at p. 971.) It is improper for the prosecution to support the credibility of a witness by arguing that the witness is telling the truth because of facts outside the record. (*People v. Medina* (1995) 11 Cal.4th 694, 757; *People v. Fierro* (1991) 1 Cal.4th 173, 211; *People v. Anderson* (1990) 52 Cal.3d 453, 479.) Similarly, the prosecutor commits misconduct if he or she expresses a personal belief in the reliability of a witness. (*People v. Perez* (1962) 58 Cal.2d 229, 245 (overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 34, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.)

Defendant complains that the prosecutor told the jury that Courtney provided an accurate account of what happened. Defendant claims that, since Courtney never testified, the prosecutor inappropriately stated, based on matters outside the record, that Courtney was reliable and honest.

The prosecutor's statement that Courtney provided the first accurate account of what occurred was not improper vouching but rather constituted argument based on evidence from which it could be reasonably inferred Courtney's version of what occurred

was accurate. (*People v. Hill, supra,* 17 Cal.4th at p. 819.) "Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts *outside* the record. (E.g., *People v. Anderson* (1990) 52 Cal.3d 453, 479.) Here, the prosecutor properly relied on facts of record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief. (*Ibid.*; see *People v. Stansbury* (1993) 4 Cal.4th 1017, 1059)" (*People v. Medina, supra,* 11 Cal.4th at p. 757.)

Here, there was evidence that, when Baeckel first interviewed Jeffrey, Jeffrey denied defendant molested him but, when Baeckel spoke to Courtney, Courtney told Baeckel defendant had molested Jeffrey. When Baeckel told Jeffrey what Courtney had said, Jeffrey acknowledged defendant had molested him. This evidence supports the prosecutor's argument that Courtney provided the first accurate account of defendant molesting Jeffrey.

**C. Appealing to the Jury's Passion and Prejudice**

Defendant contends the prosecutor committed misconduct during closing argument by appealing to the jury's passion and prejudice. In particular, defendant complains that the prosecutor called on the jury to send the message that it knows defendant is a pedophile and dangerous. The prosecutor stated during rebuttal: "With a true finding, you send [defendant] a message, and the message is simple --" Defense counsel objected, stating: "Calls to passion." The court overruled the objection and the

prosecutor continued: "And the message is simply this: We know you're a pedophile." The prosecutor again objected on the same grounds of bias and passion, which the court overruled. The prosecutor continued: "And we know as you sit here right now you are a danger. You are likely to reoffend. Do what you have to do. Do something affirmatively to reduce your risk. Recognize the problem and begin to deal with it so that you won't molest any other kids again, so you won't hurt anybody else again. It's as simple as that. I ask you to find the finding to be true."

The prosecutor's remarks were not improper. They merely responded to defense counsel's closing argument that defendant was not a pedophile, and were within the proper limits permitted for rebuttal. The prosecution responded by arguing defendant was a pedophile, and requested the jury to find that defendant was an SVP because he would likely reoffend if released.

6. Informing the Jury of Consequences of an SVP Finding

Defendant contends the prosecutor improperly informed the jury of the consequences of an SVP finding. Defendant complains that, during closing argument, the prosecutor told the jury: "Now, keep in mind this is not a case about life imprisonment or the respondent somehow being found guilty." Defense counsel objected on the ground counsel was referring to facts not in evidence. The court overruled the objection, and defense counsel continued: "This is a case about a civil commitment to a state hospital for a specified period. And the Court has instructed you – and this is something we talk about in jury selection, the consequences or punishment are not an

issue for you during jury deliberation. That is an issue for the judge to determine and for the law to work out. Our question is, Does he have the criteria? Does he meet the criteria? And in this case respondent clearly, clearly meets the criteria." Defendant did not object to this latter argument.

Relying on *People v. Rains* (1999) 75 Cal.App.4th 1165, defendant argues the prosecutor was prohibited from discussing the consequences of an SVP finding during closing argument because the subject was irrelevant and there was no evidence regarding the matter presented at trial. Defendant claims defense counsel's subsequent statement that the jury was not to consider the outcome of the case in making its decision did not remedy the inappropriate comment. Defendant argues the prosecutor improperly conveyed the message that the jury need not be concerned about finding defendant qualified as an SVP since the consequences of doing so were insignificant.

In *Rains*, the court held the trial court erred in permitting psychologists to testify to the consequences of an SVP finding on the defendant. (*People v. Rains, supra,* 75 Cal.App.4th at p. 1169.) The *Rains* court concluded the testimony was irrelevant. The court nevertheless held the error was harmless since the evidence against the defendant was undisputed, the defendant presented virtually no defense, the testimony regarding the consequences of the finding was relatively brief, and the court instructed the jury not to consider the penalty or punishment in the case. (*Id.* at p. 1170.)

Defendant's reliance on *Rains* is misplaced. The instant case does not involve admission of expert evidence regarding the psychological impact of an SVP finding on

the defendant. Rather, it pertains to a brief comment during closing argument, explaining that an SVP finding would not result in life in prison but rather a civil commitment to a state hospital.

Defendant's reliance on *People v. Allen* (1973) 29 Cal.App.3d 932 is likewise misplaced. In *Allen*, the court held the trial court committed reversible error by permitting the prosecutor to refer to the treatment the defendant would receive at the state mental institution if he were found to be a mentally disordered sex offender (MDSO). (*Id.* at p. 938.)

Furthermore, in the instant case, the prosecutor's statements regarding punishment and guilt constituted permissible rebuttal to defense counsel's closing argument that "[T]his case is not about guilty or innocent on the crimes he pled to, . . . [I]t's not about punishing [defendant] for what he did. He has paid and paid dearly already for that 1988 case."

Even assuming the prosecutor's comments were inappropriate, they were brief and inconsequential, particularly since right after making the statement, the court admonished the jury that, in deciding whether defendant was an SVP, the jury was not to discuss or consider the consequences of such a finding or punishment. The court also gave the jury CALJIC No. 17.42, which instructed the jury not to discuss or consider punishment in deciding the case. It is presumed the jury properly followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Bonin* (1988) 46 Cal.3d 659, 699, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1;

*People v. Billings* (1981) 124 Cal.App.3d 422, 428, disapproved on other grounds in *People v. Karis* (1988) 46 Cal.3d 612, 642, fn. 22.) If there was any error in mentioning the consequences of an SVP finding, it was harmless. (*People v. Rains, supra,* 75 Cal.App.4th at p. 1170.)

7. Constitutionality of the SVPA

Defendant challenges the constitutionality of the California SVPA. He claims the SVPA is punitive and thus violates the ex post facto, double jeopardy, and cruel and unusual punishment provisions of the United States and California Constitutions.

Defendant, however, acknowledges that in *Kansas v. Hendricks* (1997) 521 U. S. 346, 369-371 (*Hendricks*), the United States Supreme Court rejected various constitutional challenges to a similar Kansas SVP statute, including challenges premised on the contention the SVP law was punitive rather than civil. Nevertheless, defendant argues that the California SVPA is punitive, not civil, based on critical differences between the California and Kansas laws.

But as defendant concedes, the California Supreme Court in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, held that the California SVPA is not punitive and thus does not violate the ex post facto, double jeopardy, and cruel and unusual punishment provisions of the United States and California Constitutions. Defendant acknowledges this court must follow *Hubbart* and reject his ex post facto, double jeopardy, and cruel and unusual punishment challenges but asserts his constitutional challenges for the purpose of preserving the issues for federal review.

Since this court is bound by *Hendricks* and *Hubbart*, we reject defendant's ex post facto, double jeopardy, and cruel and unusual punishment challenges to the California SVPA. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see also *People v. Hubbart* (*Hubbart 2*) (2001) 88 Cal.App.4th 1202, 1226.)

8. Equal Protection Challenge to the SVPA

Defendant also challenges the SVPA on state and federal constitutional equal protection grounds. He complains the SVPA is a disparate involuntary confinement scheme since the definition of a mental disorder under the SPVA differs from the definition under the Mentally Disordered Offender (MDO) law. The SVPA definition is less exacting than the MDO definition. Thus, under the SVPA, a person could be committed as an SVP based on a personality disorder but could not be committed as an MDO based on the same disorder, even though in both instances the person is equally dangerous.

Defendant acknowledges various appellate courts, including *Hubbart 2, supra,* 88 Cal.App.4th at pp. 1217-1219, have rejected his equal protection arguments but no higher court has done so. (See also *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155-1163.) The court in *Hubbart 2* rejected the challenge on the following grounds: "[B]oth the SVPA and the MDO law require that the person suffer from a mental disorder rendering them dangerous beyond their control. While phrased differently, the two schemes set forth similar standards for the mental disorder necessary for commitment. The two schemes do not treat the committed person differently for purposes of defining

the requisite mental disorder. We conclude the SVPA does not violate equal protection in this respect. [Citations.]" (*Hubbart 2, supra,* 88 Cal.App.4th at pages 1218-1219.) Based on this rationale, we likewise reject defendant's equal protection challenge to the SVPA.

Defendant also raises an equal protection challenge to the SVPA on the ground the SVPA does not require treatment prior to commencing a long-term commitment or the release of persons in remission. But this challenge lacks merit because SVPs and other mentally disordered offenders subject to commitment schemes are not similarly situated for equal protection purposes regarding treatment. (*People v. Buffington, supra,* 74 Cal.App.4th at pp. 1162-1163; *Hubbart 2, supra,* 88 Cal.App.4th at pages 1220-1222.)

9. Procedural Due Process Challenge to the SVPA

Defendant contends the SVPA violates his procedural due process rights because it deprives him of liberty based on less than a preponderance of the evidence. The SVPA allows indefinite confinement based on the likelihood the individual will engage in sexually violent criminal behavior. (§ 6600, subd. (a).) The standard of proof, defendant argues, is thus less than a preponderance of the evidence.

The state supreme court in *Hubbart v. Superior Court, supra,* 19 Cal.4th at pp. 1162-1163, rejected this argument as well. Accordingly, this court rejects defendant's contention.

Furthermore, the trial court gave the jury the following reasonable doubt instructions: CALJIC No. 4.19 (commitment as sexually violent predator), which

instructed the jury that the People had the burden of proving beyond a reasonable doubt that defendant was an SVP; CALJIC No. 2.01 (sufficiency of circumstantial evidence - generally), which instructed that each essential fact must be established beyond a reasonable doubt; and defendant's special instruction, No. 4, which reminded the jury the People had the burden of proving beyond a reasonable doubt the criteria required to establish defendant was an SVP. It is presumed the jury followed the court's instructions and applied the reasonable doubt burden of proof in finding defendant was an SVP. (*People v. Sanchez. supra,* 26 Cal.4th at p. 852; *People v. Bonin, supra,* 46 Cal.3d at p. 699, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1; *People v. Billings, supra,* 124 Cal.App.3d at p. 428, disapproved on other grounds in *People v. Karis, supra,* 46 Cal.3d at p. 642, fn. 22.)

10. Rejection of Defendant's Special Instruction No. 10

Defendant contends the trial court erred in rejecting his special instruction No. 10, which states the following: "A particularly high likelihood of sexually violent predatory offense is necessary in order to distinguish committable offenders from other dangerous recidivists. This is necessary to give separate meaning to the 'mental-disorder' and 'likely to re-offend' elements of the sexually violent predator act. The 'mental disorder' prong requires a mental or emotional condition that makes it at least seriously difficult to control sexually violent predatory impulses. Therefore, the distinct requirement that the person be 'likely to re-offend' further limits the sexually violent predator act to those whose degree of dangerousness is even higher."

Upon considering defendant's proposed instruction, the trial court noted there was no authority cited for the instruction and refused the instruction on the ground the subject matter was covered in CALJIC No. 4.19. CALJIC No. 4.19, as read to the jury, states in relevant part: "'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." The instruction further states: "[Y]ou may not find respondent to be a sexually violent predator based on prior offenses without relevant evidence of a currently diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely that he will engage in sexually violent predatory criminal behavior."

Defendant argues that, under *Kansas v. Crane* (2002) 534 U.S. 407, the court should have given his proposed instruction because CALJIC No. 4.19 does not instruct the jury that an SVP conviction requires a finding that defendant suffered from a serious mental disorder which includes a serious lack of ability to control his behavior. Defendant acknowledges that the California Supreme Court in *People v. Williams* (2003) 31 Cal.4th 757, 774-775, 777, rejected this argument but wishes to preserve the issue for federal review. Defendant claims *Williams* is wrongly decided because, although the court concluded the SVPA was constitutional, the *Williams* court did not consider whether the jury instructions properly construed the SVPA.

Under the doctrine of stare decisis, this court is required to follow *Williams* and, thus, we reject defendant's contention the trial court committed instructional error by failing to give his special instruction. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455; see also *Hubbart 2, supra,* 88 Cal.App.4th at page 1226.) We conclude CALJIC No. 4.19 provided adequate instruction on the elements of commitment as an SVP and there was no error in rejecting defendant's proposed instruction.

11. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/Richli
J.